EDITOR'S NOTE

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No. _____

ORIGINAL

87-7116

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Supreme Court, U.S.
FILED
JUN 03 1988
JOSEPH F. SPANIOL, JR.
CLERK

ALVIE JAMES HALE,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

MARK BARRETT
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POST CONVICTION UNIT
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ATTORNEY FOR PETITIONER

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALVIE JAMES HALE,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Alvie James Hale, who is now in the Oklahoma State Penitentiary in McAlester, Oklahoma, asks leave to file the attached Petition for Writ of Certiorari to the Court of Criminal Appeals for the State of Oklahoma without prepayment of costs and proceed in **forma pauperis** pursuant to Rule 46 of the Rules of the Supreme Court of the United States.

Petitioner was determined to be indigent and was represented by appointment of counsel at trial and on direct appeal to the Oklahoma Court of Criminal Appeals,

The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

MARK BARRETT
Assistant Appellate Public Defender
Oklahoma Bar No. 557
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-3128

ATTORNEY FOR APPELLANT

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF OKLAHOMA)
) ss:
COUNTY OF PITTSBURG)

I, Alvie J. Hale being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case, that in support of my motion for leave to proceed on my petition for writ of certiorari to the Court of Criminal Appeals of the State of Oklahoma without being required to prepay costs or fees, or give security therefor, I state that because of my poverty I am unable to pay costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed:

N/C

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

N/C

3. Do you own any cash or checking or savings accounts?

No

4. Do you own any real estate, stock, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No

5. List the persons who are dependent upon you for support and state their relationship with those persons.

None

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

Subscribed and sworn to before me this 18 day of 198

NOTARY PUBLIC

My Commission Expires:

1-9-91

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ALVIE J. HALE, Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR PETITIONER

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SUPREME COURT, U.S.

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QUESTIONS PRESENTED

1. Should there be a presumption of unconstitutional jury partiality when -- after denial of the accused's motion for change of venue in a capital case -- the jury is composed of twelve persons who had pre-trial knowledge concerning the case, including six persons who had formed a pre-trial opinion concerning the case, two persons who knew the accused or members of the accused's family, three persons who knew the homicide victim or members of the deceased youth's family, and a journalist who was involved in press coverage of the homicide and who knew the prosecutor and some of the investigating police officers?

Related or subsidiary questions include:

a. May a state adopt standards whereby motions for change of venue are denied unless the accused proves that a fair trial would be a "virtual impossibility"?

b. Was it constitutional to deny the change of venue motion when considering additional surrounding factors, including these: (1) the homicide victim was a member of a prominent and respected banking family in the community; (2) the pre-trial publicity included articles emphasizing how much the victim was loved in the community; (3) the pre-trial publicity included articles about Petitioner's prior felony convictions; (4) one of the prior convictions which was the subject of pre-trial publicity was a federal extortion conviction arising out of the same set of events as the alleged homicide and alleged kidnapping; (5) one of the jurors had discussed the case at a beauty parlor with key State's witness Janet Miller, with there being an issue as to the reliability of Miller's eyewitness identification; (6) the prosecution offered no evidence in opposition to the defense motion for change of venue; (7) one of the jurors stated that it would require some evidence to overcome his pre-formed opinion concerning the case?

2. Is an accused unconstitutionally denied his right to effective assistance of counsel where his appointed counsel

professed animosity toward Petitioner because he suspected Petitioner of having burglarized counsel's law office and where the attorney's failures at trial included neglecting to ask that any of the twelve jurors described above be removed for cause?

a. Should prejudice be presumed due to the fact that appointed counsel requested more than two months prior to trial that he be allowed to withdraw on the basis of his belief that Petitioner tried to burglarize the law office?

b. Has unconstitutional prejudice been shown due to failure to seek to remove undesirable jurors for cause, due to failure to present available mitigating evidence, due to failure to object to the jury being allowed to consider the death penalty on the kidnapping charge, and due to various additional failures to object and failures to present an adequate defense?

3. Do the Sixth, Eighth and Fourteenth Amendments permit the jury's reliance, in support of its death verdict, on an aggravating circumstance when the defense did not have notice of that aggravating circumstance until one minute prior to trial?

4. Does an erroneous instruction that the jury may assess the death penalty on the related kidnapping count unconstitutionally affect the jury's determination of whether it should assess the death penalty on the murder count?

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ALVIE JAMES HALE, JR., Petitioner,

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

The Petitioner, Alvie James Hale, Jr., requests that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Oklahoma entered in this case on January 29, 1988.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma is reported at 750 P.2d 130 (Okla.Cr. 1988). That opinion appears as Appendix A to this petition. No opinions were rendered by the trial court.

JURISDICTION

The Petitioner is seeking a writ of certiorari to the Court of Criminal Appeals of Oklahoma to review a judgment entered on January 29, 1988. A petition for rehearing was denied by the Court of Criminal Appeals on March 2, 1988. An order by the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit, extended the time for filing this petition for writ of certiorari until May 31, 1988. Jurisdiction is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, amendment VIII, provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, amendment XIV, provides in pertinent part:

... nor shall any State deprive any person of life, liberty or property without due process of law ... .

STATEMENT OF THE CASE

The Petitioner was charged in district court in Pottawatomie County, Oklahoma with First-Degree Murder and with Kidnapping for Extortion. Both offenses allegedly occurred on October 11, 1983. (R. 1) About two and a half months prior to his trial on those charges, Petitioner was convicted in the United States District Court for the Western District of Oklahoma of Affecting Interstate Commerce by Extortion. The federal extortion offense arose from the same alleged criminal episode as that charged in Pottawatomie County. (R. 99)

When the federal extortion conviction occurred, the Shawnee News-Star, the only daily newspaper published in Pottawatomie County, ran a banner headline across the front page, stating: "Hale found guilty of extortion." The article quoted the federal judge as having said that it was with "little or no difficulty that this court finds the defendant guilty." (Defendant's Exhibit 2 contained in Appellant's Supplement A to Record)

Other newspaper articles distributed in Pottawatomie County prior to trial pointed out that homicide victim Jeff Perry, the twenty-four-year-old son of prominent Pottawatomie County bankers, was loved in the community. One article stated: "Merchants up and down Tecumseh's main street shook their heads and grieved for the loss." (Defendant's Exhibit 1-E contained in Appellant's Supplement A to the Record)

Articles mentioned that Mr. Hale had three prior felony convictions and had had twelve civil lawsuits filed against him. (Defendant's Exhibits 1-D and 1-K to Appellant's Supplement A) The media reported on the attempt of Petitioner's attorney to withdraw from the case (Defendant's Exhibit 2-C contained in Appellant's Supplement A to Record) and on allegations that Petitioner had considered killing witnesses to the charged offenses. (Defendant's Exhibit 2-K in Appellant's Supplement A)

The prejudicial pre-trial publicity prompted trial counsel to file a Petition for Change of Venue, to which twenty-six

exhibits were attached. (Appellant's Supplement A to Record) Examples of the media coverage were accompanied by affidavits of Pottawatomie County residents who believed the community had already decided that Mr. Hale was guilty. Two of the affiants testified at the hearing on the change of venue petition. (M Tr. 6-10, 12-15) ["M Tr." refers to the transcript of February 24, 1984 motion hearing.]

The prosecution presented no evidence to rebut the contention that most people in Pottawatomie County already believed Mr. Hale to be guilty. (M Tr.)

The trial judge declined to make a pre-trial ruling on the Petition for Change of Venue, reserving ruling on the matter until the conclusion of voir dire. At the conclusion of voir dire, the Petition for Change of Venue was denied. (Tr. 170)

Voir dire confirmed some of the contentions in the Petition for Change of Venue: the pre-trial publicity was pervasive and a substantial percentage of the populace had formed some opinion about Mr. Hale's guilt prior to his trial. Thirty-four of the thirty-seven prospective jurors had read newspaper accounts concerning the alleged offense and all twelve of the persons who actually served on the case were familiar with the case by virtue of the media coverage. (Appellant's Supplement B to Record)

Six persons who served on the jury had formed opinions about the case prior to trial. One of these jurors was the foreman. (Tr. 46, 54, 55, 113, 131, 163)

One of the jurors (Zeigler) who served on the case was a former employee of the Perry family at the Farmers and Merchants Bank. (Tr. 142) Another juror (Kane) who sat on the case worked for a savings and loan institution. (Tr. 13)

One of the jurors (Farley) was a photographer and reporter for the Shawnee **News-Star**. Farley, who had formed an opinion about the case prior to trial, had assisted in news coverage of Mr. Hale's case. (Tr. 55) Farley had discussed the case "at length" with his co-workers. (Tr. 95-96)

Farley was acquainted with the district attorney (Tr. 22) and knew three of the police officers who were listed as State's witnesses. (Tr. 28-29, 34)

Chesser, another of the twelve persons who were ultimately chosen to comprise the jury, had discussed Mr. Hale's case at a beauty parlor with key State's witness Janet Miller. (Tr. 163) The reliability of Miller's eyewitness identification was an issue in the case. Miller testified at trial that the Petitioner was the man she saw driving a station wagon near an injured person (allegedly Jeff Perry) who was calling for help. (Tr. 313)

Miller failed to identify Mr. Hale in a photographic lineup (Tr. 311), indicated that having seen Mr. Hale's picture on television was a factor in the identification process (Tr. 313), and originally described the man she saw as being a large Indian. (Tr. 310)

Nickey Johnson -- the person who killed Jeff Perry according to an account told by a Federal Bureau of Investigation informant -- is a large Indian man. (Exhibits D, E, and F to Mr. Hale's Supplement to Petition for Rehearing)

Juror Huddleston, also one of the final twelve chosen, said that it would require some evidence, although "probably not" a "lot" of evidence, to overcome his pre-formed opinion concerning the case. (Tr. 131)

Juror McLaughlin, who also sat as one of the final twelve, at one point said that he could set his bias aside and decide the case fairly, but at another point indicated that the bottom line was "I really don't know" whether the bias could be set aside. (Tr. 46-47)

McBee, another of those actual serving on the case, indicated that the bottom line for him was that he could set his bias aside or would at least "attempt to." (Tr. 54)

Although trial counsel contended that a change of venue should have been granted, he did not ask that any of the twelve jurors who actually served on the case be removed for cause.

Trial counsel used all nine of his peremptory challenges. He excused two prospective jurors (Evans and Goodson) who said they knew the Perry family and excused two jurors (Henson and Marsh) who said they had formed an opinion about the case prior to trial.

Trial counsel filed a motion on December 19, 1983 -- more than two months prior to Mr. Hale's trial -- to withdraw as Mr. Hale's appointed counsel. The application stated that the attorney "believes that the Defendant attempted to burglarize his law office in early 1983" and that such belief caused the attorney to have "a personal dislike, distrust and animosity toward the Defendant which will prevent the desirable communication and trust that is necessary to an attorney-client relationship." (R. 32) Neither Petitioner Hale nor a court reporter was present at the hearing on this motion. The application to withdraw was denied. (R. 32)

In addition to believing that he was a victim of a felony committed by Mr. Hale and in addition to not asking that the objectionable jurors be removed for cause, trial counsel failed to present needed defense evidence and failed to object to some improper evidence an instructions. The attorney failed to present any mitigating evidence in the second stage of the trial, even though helpful mitigating evidence was available to the attorney. (Appellant's Supplement D to Record)

He failed to object to the lateness of the notice when the prosecution informed the defense one minute prior to trial that the State intended to rely on the aggravating circumstance that the offenses allegedly were committed to avoid a lawful arrest or prosecution. (R. 227, Tr.3) He also failed to object to the trial court's instructions (R. 201-18) authorizing the jury to return a death verdict on the kidnapping count.

Defense counsel also failed to object to evidence that an unidentified person resembling Mr. Hale had attempted a kidnapping on the day prior to Jeff Perry's disappearance. (Tr. 299-301, 547) He also failed to object when the State introduced

evidence that Mr. Hale had beaten Mark Weaver after Weaver told FBI agents he would testify against Mr. Hale. (Tr. 378) Trial counsel failed to request instructions on lesser included offenses (R.) and presented only a perfunctory second-stage defense.

His second-stage defense consisted of a brief (three and one-half pages of transcript) closing argument (Tr. 551-54), did not include needed challenges to the State's aggravating circumstances, and did not include presentation of any evidence.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The first question was raised when Petitioner's attorney filed, in compliance with the applicable Oklahoma statute on requests for change of venue, a Petition for Change of Venue. (R. 127-32) The trial judge declined to rule on the change of venue request until after voir dire. At the conclusion of voir dire, the motion for change of venue was denied. (Tr. 170)

The denial of the application for change of venue was raised as an issue on appeal to the Oklahoma Court of Criminal Appeals. Appellate counsel relied in part on the United States Constitution's Fourteenth Amendment (Appellant's Brief, page 17) and relied on federal due process principles elsewhere in the proposition (Appellant Brief, page 13) and relied on other federal constitutional authority regarding the right to an impartial jury. (Appellant's Brief, pages 13-14)

The Oklahoma Court of Criminal Appeals analyzed the change of venue issue both under applicable provisions of state law and under federal constitutional principles. 750 P.2d at 134-35. The appellate court determined however that the change-of-venue contentions were "without merit." Id. at 135.

The issue regarding defense counsel's conflict of interest was raised by trial counsel filing an "Application to Withdraw as Attorney." (R. 32) This application was filed more than two months prior to trial and was denied in a court minute handwritten on the original copy of the motion. (R. 32) The application appears to have been denied on the same day it was filed.

Mr. Hale's appellate counsel raised the issue of failing to allow the attorney to withdraw as an issue on appeal. (Proposition IV of Appellant's Brief, pages 33-34) Appellate counsel contended specifically that the denial of the application to withdraw was in violation of the federal constitution's Sixth Amendment right to counsel and in violation of the federal constitution's Fourteenth Amendment right to due process of law.

United States Supreme Court authority was cited in support of these contentions. (Appellant's Brief, page 34)

None of the remaining issues was raised at the trial level. However, appellate counsel raised each of the remaining issues on appeal and the Oklahoma Court of Criminal Appeals ruled on the remaining issues.

All the above arguments in support of the claim of ineffective assistance of counsel were raised in Propositions III and IV of the brief on appeal. (Appellant's Brief, pages 20-34) Appellate counsel relied on the Sixth, Eighth, and Fourteenth Amendments to the federal constitution. (Appellant's Brief, pages 28-32) After considerable discussion of the ineffectiveness issues, 750 P.2d at 140-42, the Court of Criminal Appeals held that upon considering "the record as a whole, we cannot find that appellant was denied his Sixth Amendment right to effective assistance of counsel." Id. at 142.

The issue concerning the failure to provide sufficient notice regarding the additional aggravating circumstance was an issue which was raised in Proposition XIV, in which appellate counsel cited Sixth, Eighth, and Fourteenth Amendment authority. (Appellant's Brief, pages 57-59)

The Court of Criminal Appeals said the Proposition XIV contention was "frivolous." "There was no error, and even if there had been, it was waived," the opinion states. 750 P.2d at 139.

The issue regarding the instruction which authorized the death penalty for kidnapping was an issue which was raised in Proposition XVI on appeal. Appellate counsel relied on Eighth and Fourteenth Amendment authority. (Appellant's Brief, pages 63-65)

The Court of Criminal Appeals stated that instructing on the death penalty on the kidnapping offense was erroneous. However, it added: "Since the jury did not assess the death penalty for the extortion [sic] conviction, appellant has not demonstrated prejudice resulting from the improper instruction." 750 P.2d at

REASONS FOR GRANTING THE WRIT

I.

The Issue Regarding Change of Venue Motions in Cases Where There Are Various Strong Indicia of Jury Partiality Is an Important Federal Issue Which Should Be Decided By This Court.

Recently, this Court encountered another case in which the homicide victim was a well-known and well-liked resident of a relatively small county. Several of the jurors in that case knew the homicide victim or her family. See **Brecheen v. Oklahoma**, ___ U.S. ____, ____, 108 S.Ct. 1085, 1085 (1988)(Marhsall, J., dissenting from denial of certiorari).

The **Brecheen** case indicates that Mr. Hale's case does not represent just one rare instance of a jury pool with emotional ties to the victim's family. Rather such issues will arise from time to time where the homicide victim is a well-known person in a county of small to moderate population.

The indicia of prejudice are greater in Mr. Hale's case than they were **Brecheen**. Therefore, in addition to the need for providing guidance as to the circumstances that might give rise to a presumption of prejudice in the sentencing phase of a capital trial, **id.** at 1087, there is a need in the case at bar to determine whether the case at a whole was "inherently lacking in due process." **Estes v. Texas**, 381 U.S. 532, 542-43 (1965). See also **Murphy v. Florida**, 421 U.S. 794, 799 (1975); **Sheppard v. Maxwell**, 384 U.S. 333, 362 (1966)("Due process requires that the accused receive a trial by an impartial jury free from outside influences").

Although the cited cases and other Supreme Court cases make ample reference to the need for a jury free of outside influences, none of the cases have determind whether that right is violated by a combination of prejudicial pre-trial publicity and the surrounding factors present here. The most salient of those surrounding factors are that the jury pool is pervaded with persons who have some type of emotional or community tie to the homicide victim's family and that the pool is pervaded with

persons who have formulated pre-trial opinions concerning the accused's guilt.

II

Oklahoma's Standard for Examining Change of Venue Applications Is in Conflict With That of Other Jurisdictions.

As also pointed out in the dissent to denial of certiorari in the **Brecheen** case, Oklahoma case law has established that applications for change of venue should be denied unless there is "clear and convincing evidence" that a fair trial would be a "virtual impossibility" without the grant of the venue change. 108 S.Ct. at 1086. Although this standard was not articulated in Petitioner Hale's case, the Court of Criminal Appeals did not announce a new standard for evaluating change of venue motions and thus must be assumed to have followed its own previously announced legal principles regarding the "virtual impossibility" of a fair trial. The appellate court in Mr. Hale's case ruled that "it cannot be said that the appellant met his burden of showing that the trial court abused its discretion by failing to grant the change of venue" and that the change of venue assignment of error was "without merit." 750 P.2d at 135.

Some jurisdictions are of the opinion that a change of venue motion should be granted when there is a "reasonable likelihood" that the defendant could not get a fair trial without a change of venue being granted. 108 S.Ct. at 1086. See also **State v. Pease**, 740 P.2d 659, 664 (Mont. 1987); **Langham v. State**, 491 So.2d 910 (Ala.Crim.App. 1986); **People v. Gendron**, 243 N.E.2d 208 (Ill. 1968) **cert. denied** 396 U.S. 889 (1969).

On the other hand, Oklahoma is not alone in deciding change of venue motions under the "virtual impossibility" standard. **State v. Jenkins**, 508 So.2d 191 (La.App. 1987). **Cf., State v. Hunter**, 740 P.2d 559, 565 (Kan. 1987).

The "reasonable likelihood" standard appears to comport most closely with United States Supreme Court precedent that corrective action should be taken when there is a well grounded fear that the totality of the circumstances indicate that a fair trial

cannot occur. See Groppi v. Wisconsin, 400 U.S. 505, 510-11 (1971); Singer v. United States, 380 U.S. 24, 35 (1965).

III.

This Court Has Not Answered the Important Federal Question of the Cirumstances Under Which Prejudice Will Presumed As a Result of a Conflict Between Trial Counsel and Client.

In **Holloway v. Arkansas**, 435 U.S. 475, 489 (1978) this Court held that prejudice is presumed and reversal automatic when trial counsel requests, based on representations that a conflict of interest exists, weeks prior to trial that separate counsel be appointed for each of two co-defendants.

In Mr. Hale's case, trial counsel moved weeks prior to trial to be relieved of his appointment due to a conflict between himself and his client. There was a strong articulable basis for the conflict: Mr. Hale once rented an office near appointed counsel's law office and appointed counsel suspected Mr. Hale of trying to burglarize the law office. This belief that trial counsel had been the victim of a felony committed by Mr. Hale was a belief which caused appointed counsel to have great personal animosity toward Mr. Hale. A proper attorney-client relationship was impossible, trial counsel told the trial court. (R. 32)

IV.

Certiorari Should Be Granted to Determine the Important Federal Question of the Circumstances Under Which Discord Between Attorney and Client Creates an Unconstitutional Conflict of Interest.

Prior conflict-of-interest cases of this Court generally have focused on conflicts created by representation of multiple parties. **E.g., Wood v. Georgia**, 450 U.S. 261 (1981); **Cuyler v. Sullivan**, 446 U.S. 335 (1980); **Holloway v. Arkansas**, 435 U.S. 475 (1978). Various other courts have found conflicts of interest to exist regarding various problems existing between a single attorney and a single client.

For example, in **Walberg v. Israel**, 587 F.Supp. 1476, 1479-80 (E.D. Wis. 1984), it was held that there was no per se Sixth Amendment violation when the conflict between attorney and client was a conflict centered around the attorney's desire to collect

his fee from the client. On the other hand, a conflict has been held to be apparent when the defense attorney was also the chief prosecution witness. **Uptain v. United States,** 692 F.2d 8 (5th Cir. 1982).

Not always have courts required, for relief to be granted, a showing that the defense attorney is actively working against the interests of his client. Two circuits have held that an attorney should be relieved of his appointment when there is a legitimate irreconcilable conflict between attorney and client on how to conduct the defense. **United States v. Hart,** 557 F.2d 162, 163 (8th Cir.) **cert. denied** 434 U.S. 906 (1977); **Brown v. Craven,** 424 F.2d 1166, 1170 (9th Cir. 1970).

The Fifth Circuit has held that there is an unconstitutional conflict of interest when the attorney previously had filed a complaint against the client in an unrelated case. **Gray v. Estelle,** 616 F.2d 801 (5th Cir. 1980). Compare **United States v. Crockett,** 506 F.2d 759 (5th Cir. 1975); **Russell v. Wyrick,** 395 F.Supp. 643 (W.D. Mo. 1974).

V.

This Court Should Grant Certiorari to Further Address the Important Federal Question of the Circumstances Under Which a Combination of Conflict and Counsel's Failures Will Result in the Judgment and Sentence Being Unconstitutional in a Capital Case.

In **Burger v. Kemp,** 483 U.S. ___, 107 S.Ct. 3114 (1987) this Court began to define criteria for determining when alleged conflicts of interest and shortcomings of counsel will result in the judgment and sentence being unconstitutional. Since it is various specific facts rather than one broad issue which was important to the analysis in **Burger,** this Court could provide further guidance by approaching the issue from the particular set of facts which exist in Mr. Hale's case.

The **Burger** case and the case at bar are similar in that they involve alleged combinations of a conflict and failures to protect defendant's rights. The cases are significantly different in regard to the particular facts which support such contentions.

VI.

This Court Should Grant Certiorari to Decide the Important Issue of Whether the One-Minute-Prior-to-Trial Notice of an Aggravating Circumstance is Constitutionally Sufficient.

The decision of the Court of Criminal Appeals concerning the notice of the aggravating circumstance is arguably in conflict with this Court's decision in **Presnell v. Georgia,** 439 U.S. 14 (1978). Certiorari should be granted to determine whether the notice was constitutionally adequate.

VII.

Certiorari Should Be Granted to Determine the Important Federal Question of Whether an Unconstitutional Instruction That the Death Penalty May Be Considered on the Kidnapping Count Unconstitutionally Affects the Life-Death Determination Which the Jury is Making on the Murder Count.

In **Hicks v. Oklahoma,** 447 U.S. 398 (1980) this Court held that constitutional error occurs when the jury receives erroneous information about the range of punishment, even if the sentence actually given is within the range authorized by law. This Court should grant certiorari to determine whether, in a capital case, the **Hicks** principle applies when the erroneous information involves the punishment for a related offense and not the offense as to which punishment was allegedly unconstitutionally determined.

CONCLUSION

For the reasons stated, the Petitioner requests that a writ of certiorari be granted.

Respectfully submitted,

Mark Barrett
Assistant Appellate
Public Defender
1660 Cross Center Drive
Norman, Oklahoma 73019
(405) 325-3128

Counsel for Petitioner

APPENDIX A

OPINION

COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 29 1988
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALVIE JAMES HALE, JR.,

Appellant,

-vs-

STATE OF OKLAHOMA,

Appellee.

No. F-84-208

FOR PUBLICATIO

AUTHORIZED FOR PUBLICATION
JAN 29 1988
COURT OF CRIMINAL APPEALS

O P I N I O N

BUSSEY, Judge:

Appellant, Alvie James Hale, Jr., was convicted in Pottawatomie County District Court of Murder in the First Degree and Kidnapping for Extortion, Case No. CRF-83-348. The death penalty was assessed for the murder conviction and life imprisonment was assessd for the kidnapping conviction.

The crimes of which appellant was charged were for the kidnapping and murder of William Jeffrey Perry of Tecumseh, Oklahoma. The victim, his sister, and his parents owned and managed a local bank. When he failed to arrive for work Tuesday morning, October 10, 1983, his sister went to his home to locate him. She found his automobile in the driveway, the front door to his home open, his clothes laid out for work and Jeff missing. The only sign of a struggle was an upset alarm clock. At 10:30 a.m. that day, Jeff's mother received the first of a series of telephone calls concerning her son from an unidentified man. The second call came at 1:30 p.m. and was received by Jeff's sister, Veronica, who was asked "where the money was, where the $350,000.00 was?" During each call, the family asked to speak with Jeff and were told that he was at a lake cabin but that he would be released after the caller received $350,000.00 from them. The family could not arrange to have the money until the following day.

At approximately 7:00 a.m. the morning of October 11, 1983, a man identified as appellant came to the bathroom window of the house where Janet Miller lived. He asked her if he could use

a telephone and she told him there wasn't one. As the man went back to this white station wagon in her driveway, a second man dressed only in undershorts yelled for help from an adjacent field. Appellant hurried to the spot where the second man, who was bent over with pain, was located and pulled him over a fence into the automobile. Hale was convicted in federal court of the charge of Affecting Interstate Commerce by Extortion based upon his actions in this case.

The F.B.I. was called on Tuesday and traced the telephone calls made to the Perrys. They were also present on October 12 when Mrs. Perry placed the cash at the dropsite. Appellant arrived and picked up the money before Mrs. Perry could get back into her vehicle. The F.B.I. agents pursued appellant traveling at high speeds in Oklahoma City until his vehicle finally came to a stop after hitting a drainage ditch, went airborne and then finally stopped after an F.B.I. agent's vehicle collided head on with appellant's truck. All the money Mrs. Perry had delivered was found in the truck and appellant was taken into custody at that time.

Appellant made a statement to F.B.I. agents on October 12, 1983. He claimed that he had been hired by a man named Poe to pick up money owed Poe by the Perry's. He stated that he knew nothing of the disappearance of Jeff Perry.

Appellant's father gave law enforcement officers consent to search his home and property. Officers found there the victim's body wrapped in a dark colored trampoline tarp within a metal storage shed; one which fit a trampoline frame found at his own home. Jeff Perry had been shot a number of times. Also located there was a cream colored station wagon appellant had used the morning of October 11th. A blood stained towel was found in the vehicle which contained a hair identified as that of appellant. A .38 caliber revolver was found in a kitchen cabinet. There was a great deal of other physical evidence linking appellant to the offenses.

Appellant moved for a change of venue prior to his trial based upon extensive adverse media coverage of his case. The trial court delayed ruling on the motion until after voir dire of the venire, at which time it was denied.

Appellant in assigning error notes that each of the jurors who sat on the petit jury had read or heard of his case in the media. Six admitted having formed opinions concerning the case. Some knew members of appellant's family, and some were acquainted with members of the victim's family.

Each of the jurors finally seated stated that he or she could set aside any opinion held and impartially judge the case on the evidence presented at trial. This is the standard of a fair jury trial. Foster v. State, 714 P.2d 1031 (Okl.Cr.1986), cert. denied, ___U.S.___, 107 S.Ct. 249.

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

Appellant cites Irvin and the reversal therein in support of his contention that his own conviction should be reversed. Irvin, however, is distinguishable from the case at bar. In Irvin, a jury panel of 430 individuals were called, of which the trial court excused 268 members on challenges for cause as having fixed opinions as to the guilt of the petitioner. The petitioner used all twenty of his peremptory challenges. In the case at bar, only thirty-seven prospective jurors were interviewed. Seven were excused for cause and eighteen were peremptorily challenged. The record reveals that every juror

challenged for cause was excused by the trial judge. Defense counsel only requested that one prospective juror be excused for cause, and that request was granted.

In Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), after reviewing cases which were reversed due to the press coverage, the Court summarized:

> The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.

421 U.S. at 799. Although there was a great amount of pretrial publicity in Murphy, the Court held that the petitioner had failed to show that the setting of the trial was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice. The Court contrasted the jury selection in Irvin, and noted that in the case before them twenty of seventy-eight persons questioned were excused because they indicated an opinion as to petitioner's guilt.

In the case at bar, where every juror challenged for cause was excused, it cannot be said that the appellant met his burden of showing that the trial court abused its discretion by failing to grant the change of venue. Andrews v. State, 555 P.2d 1079 (Okl.Cr.1976). This assignment is without merit.

II

Appellant next contends that the trial court erred in not allowing individual sequestered voir dire of the veniremen. He argues that his voir dire of the potential jurors was unduly hampered since the court refused his motion.

Appellant points out several instances where individual voir dire would have facilitated a greater depth of inquiry. We note, however, his pretrial request was for individual questioning concerning the death penalty only, and he did not request it again during voir dire. Yet we find no abuse of discretion by the trial court in declining the pretrial motion. Foster v. State, 714 P.2d

1031, cert. denied, ____U.S.____, 107 S.Ct. 249; Irvin v. State, 617 P.2d 588 (Okl.Cr.1980).

III

Appellant urges reversal due to error commited by the trial judge in refusing to grant trial counsel's Application to Withdraw from the case. Trial counsel asked to withdraw from representing Hale because he suspected appellant of attempting to burglarize his offices and thought that his personal animosity might hinder communications with Hale. The trial court held a hearing out of Hale's presence and declined the application. We find no abuse of the court's discretion in requiring counsel to overcome his personal feelings and to represent Hale. There is no constitutional right to an attorney client relationship free of animosity. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). This issue was not properly preserved for review on appeal either because it was not raised in appellant's Petition in Error. This assignment must fail. Chronister v. State, 538 P.2d 215 (Okl.Cr.1975).

IV

Appellant seeks reversal because of the improper introduction of evidence of other crimes. As he points out in his own brief, no objection was raised at trial. Failure to object to the introduction of other crimes evidence waives the error on appeal. Thompson v. State, 705 P.2d 188 (Okl.Cr.1985); Brogie v. State, 695 P.2d 538 (Okl.Cr.1985). Fundamental error did not result, therefore, this assignment will not be considered.

V

Appellant argues that he was deprived of his fundamental right to confront witnesses against him when a chart showing the times and locations of ransom calls made to the extortion victim's home was admitted into evidence. He contends that the chart established his connection with the kidnapping because it contained notations showing, "Hale admits call." We hold that even if error occurred and such error had been properly preserved on appeal, it amounted at most to harmless error where oral testimony established the locations from which the calls were

made. F.B.I. agents observed appellant making those calls, and regardless of anything else, appellant's connection with the kidnapping was established when he was observed at the scene where the money was picked up and was subsequently apprehended with all of the money in his possession. Authority that harmless error will not require reversal is manifold. See, e.g., Harrall v. State, 674 P.2d 581 (Okl.Cr.1984). The assignment is without merit and must fail.

VI

Appellant urges that prejudicial error occurred when the trial court refused to instruct on lesser included offenses. First, he urges that an instruction on extortion should have been given as a lesser included offense on the kidnapping charge. Although it is true that the evidence presented at trial could have supported a conviction for extortion, we hold that extortion is simply not a lesser included offense to the crime of Kidnapping for Extortion. To be a lesser included offense, all of a crime's essential elements must be contained within the crime charged. If it contains an element not required for conviction of the crime charged, it is not a lesser included offense. For conviction on a charge of extortion, the State must show that the defendant in fact obtained goods with consent by force or fear. There is no such requirement in kidnapping. The State in this case probably could have successfully prosecuted a charge of extortion had it attempted to do so, but it is not a lesser included offense.

Appellant also contends that the jury should have been instructed on manslaughter and second degree murder. A trial court should not instruct on a lesser included offense if the evidence will not reasonably support a conviction on the lesser included offense. Funkhouser v. State, 721 P.2d 423 (Okl.Cr.1986). The murder victim in this case died from gunshot wounds to the head fired from close range after being shot in the arm, leg, and abdomen. From the nature of the wounds and the surrounding circumstances, we do not believe that a rational juror could find from the evidence that the death was not the result of a premeditated design to effect death, and there was absolutely no

evidence that the death arose from heat of passion. Since the evidence did not support convictions of second degree murder nor of manslaughter, it was not error for the judge to refuse instructions on them.

VII

Appellant urges that reversal is required because identification of appellant by an unreliable witness was admitted into evidence. We do not concede that the testimony was unreliable, but even if it were, defense counsel impeached the witness' testimony, no objection to the identification was raised, and the identification issue was not raised in the Petition in Error. The issue was not preserved for appeal, Carter v. State, 698 P.2d 22 (Okl.Cr.1985), and will not be considered by this Court.

VIII

Appellant claims that he was subjected to double jeopardy as a result of his federal conviction, and that the trial court improperly allowed the State to try him for both kidnapping and murder where the crimes arose from the same transaction. With regard to the federal conviction, appellant admits that retrial by the State would not be barred by any decisions of the United States Supreme Court. Rather, he relies upon the State Constitution at Article II, § 21, which states in pertinent part, "[no] person [shall] be twice put in jeopardy of life or liberty for the same offense."

Appellant points out that this Court recognizes and applies two distinct tests to determine whether there has been a violation of a defendant's protection against double jeopardy. In Johnson v. State, 611 P.2d 1137 (Okl.Cr.1980), cert. denied, 499 U.S. 1132, 101 S.Ct. 955, 67 L.Ed.2d 120, we delineated these tests and discussed their proper applications. First, a "same transaction test" should be applied to determine whether the various crimes charged should be joined in a single trial. If the various charges arose from a single criminal episode, the defendant should be protected from having to defend himself in multiple prosecutions. Therefore, all charges arising from a

single criminal episode should be joined in a single trial unless the defendant has in some manner waived his protection against double jeopardy. Appellant argues that since the federal charges against him arose from the same criminal episode as the State's charges, a second, separate trial by the State violated his rights. The argument is without merit. Although it has not been specifically included in the rule before, joinder of charges arising from the same criminal episode must be possible before a prosecutor can be required to join them. In this case, it was not. The State could not have brought its charges in the federal proceeding, nor could it have prosecuted the federal charges in the State proceeding. Where separate charges are brought by federal and State officials, we hold that the "same transaction test" has no application and appellant's protection against double jeopardy is not violated by virtue of the separate trials.

The second test addressed in Johnson is known as the "same evidence test." Appellant misconstrues the application of this test, which was set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932):

> Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not . . . .

Appellant urges that he was exposed to double jeopardy on the State charges because some of the same evidence was used to convict him on each one. That does not, however, go to the question which is whether Kidnapping for Extortion and Murder in the First Degree each require "proof of an additional fact which the other does not." Clearly, the State is not required to prove death of a human for conviction on the kidnapping charge, nor to prove purposes of extortion on first degree murder. We find the double jeopardy arguments to be without merit.

IX

Appellant seeks reversal of his convictions claiming that his fundamental right to a fair trial was violated when the trial court improperly admitted five audio tapes of ransom calls

without proper authentication. Generally, admission of evidence is a matter for the discretion of the trial judge, and absent a showing of abuse, the ruling will not be disturbed on appeal. Cooper v. State, 671 P.2d 1168 (Okl.Cr.1983). Although in this case only one tape was identified as a recording of appellant's voice by someone familiar with his voice, all tapes were identified as a recording of appellant's voice by someone familiar with his voice, all tapes were identified as accurate recordings of the calls made. Other evidence was introduced to show that the calls were made from specific locations and that appellant was the one who made the calls. Authentication by direct testimony identifying the voice as that of the defendant has long been recognized as valid, Hurt v. State, 303 P.2d 476 (Okl.Cr.1956), but is not necessarily the only valid method of authentication. In Hammers v. State, 337 P.2d 1097 (Okl.Cr.1959), this Court rejected the use of tapes where none of the parties present when the recording was made testifed and there were no identifying marks on the tapes to show that they were in fact recordings of the alleged conversation. In holding that the tapes were insufficiently authenticated, we said:

> The proper procedure would have been to have the recording played in Green's presence . . . Green would then have been in a position to identify the recording of the voices as taken from his wire recording.

In this case, the tapes were authenticated as ransom calls received at the Perry residence, the phone company identified the locations from which the calls were made, and witnesses identified appellant as the man making calls from those locations at those times. Thus, we find that, as in Grimes v. State, 365 P.2d 239 (Okl.Cr.1961), the parties to the call were adequately authenticated and the weight of the tapes was a matter for the jury's determination.

Furthermore, even if the tapes themselves had not been properly authenticated, other evidence in the case was still overwhelming that we cannot view their admission as anything more than harmless error.

Appellant urges that his conviction on the kidnapping charge was not proved beyond a reasonable doubt, and his conviction on that count must therefore be reversed. We find the contention without merit. When sufficiency of the evidence is used to attack a verdict, the test to be used is whether, after viewing the facts in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt each essential element of the crime charged. If a rational trier of fact could, then there will be no reversal for insufficiency of the evidence. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Spuehler v. State, 709 P.2d 202 (Okl.Cr.1985). The essential elements of the crime of Kidnapping for Extortion are: 1) the unlawful, 2) forcible seizure and confinement, 3) of another, 4) with intent to extort money from any person. 21 O.S.1981, § 745(A); OUJI-CR 470. Appellant claims that there was no evidence that he forcibly seized or confined the victim in this case. There were no eyewitnesses to the abduction at the victim's residence, but it is well established that elements of a crime may be proved by circumstantial evidence. Atterberry v. State, 555 P.2d 1301 (Okl.Cr.1976). Evidence in this case included unusual circumstances where the victim didn't show up for work and was absent from his home without locking it or taking his shoes, keys, or billfold. A witness testified that she saw appellant drag a man consistent with the victim's description into his car from a field. Blood was found in that field. The victim's body when found showed three nonfatal gunshot wounds. From these facts, a reasonable jury could have found beyond a reasonable doubt that appellant had forcibly seized and detained the victim. Therefore, this argument must fail.

XI

The trial judge instructed the jury that Kidnapping for the Purpose of Extortion, 21 O.S.1981, § 745, was punishable by the death penalty, and no less than ten years' imprisonment. Appellant contends that although the jury only recommended a sentence of life imprisonment, this error was so prejudicial as to deny him his fundamental right to a fair trial.

We find that the portion of this statute allowing the penalty of death for the offense of Kidnapping for the Purpose of Extortion has been repealed by implication upon enactment of the current death penalty jurisprudence found at 21 O.S.1981, SS 701.7 et seq. Atchley v. State, 473 P.2d 286 (Okl.Cr.1970). However, this precise issue has not previously been adjudicated by this Court and we cannot agree that the prosecutor's request for the death penalty for this offense, and the trial court's instructions to the jury of it was the result of wilful misconduct intended to deny appellant a fair trial. Since the jury in this case did not assess the death penalty for the extortion conviction, appellant has not demonstrated prejudice resulting from the improper instruction. Bumper v. North Carolina, 391 U.S. 545, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

XII

The State introduced at trial two color photographs depicting the victim's body outside the storage bin where it was found by law enforcement officers. Appellant contends they had no probative value because the cause of death was not disputed.

The photographs in question showed the gunshot wounds suffered by the victim. The nature and the extent of the victim's injuries is relevant subject matter in a homicide case. Johnson v. State, 675 P.2d 438 (Okl.Cr.1984). Photographs can aid a jury in understanding the medical examiner's and other witnesses' testimony concerning the victim's injuries. We disagree that the probative value of the photographs was outweighed by their prejudicial value.

XIII

Appellant seeks reversal on the grounds that the trial court failed to make sufficient inquiry to determine whether the jurors selected were actually unbiased. Examination of veniremen is a matter of discretion for the trial judge.

The record reflects extensive questioning by the court eliciting potential biases, their source and determining whether those biases would impair the venireman's ability to fulfill his role as a juror. We cannot from this record conclude that the

trial court abused its discretion in the examination of jurors for qualification. See Manning v. State, 630 P.2d 327 (Okl.Cr.1981). Nor do we find defense counsel's conduct during voir dire to be deficient. Challenges to veniremen are a matter of trial technique which should not be second guessed with the benefit of hindsight. Stover v. State, 674 P.2d 566 (Okl.Cr.1984). We find this assignment to be without merit.

XIV

Appellant contends that the trial court erred in not excusing two jurors who indicated that they held preconceived opinions of Hale's guilt. One of these two also stated that she had discussed the case with a witness called by the State, Linda Miller McKenzie. Each of these jurors stated, however, that they could set aside their opinions and render a verdict on the evidence presented at trial. This is all that can be asked of a juror. Frye v. State, 606 P.2d 599 (Okl.Cr.1980). Neither juror was challenged for cause, and is not now subject to challenge. Parsons v. State, 103 P.2d 1144 (Okl.Cr.1979).

XV

Appellant relies upon Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), for the proposition that imposition of separate punishments for his federal and State crimes violated his rights against double punishment. The proposition is clearly without merit because under Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), on which Whalen is based, the two crimes simply are not the same. The question is not whether the elements of Affecting Interstate Commerce by Extortion are "virtually identical" to those of Kidnapping for Extortion, as appellant contends. Rather, it is whether each offense requires proof of an element not contained in the other. There need not be an interstate nexus to prove Kidnapping for Extortion, nor is forcible seizure and detention necessary to prove the federal offense. Thus, the crimes are different.

XVI

Appellant complains that reversible error occurred when the State filed an Amended Bill of Particulars immediately prior to trial. We find the assignment frivolous. Even Gohlson v. Estelle, 675 P.2d 734 (5th Cir. 1982), relied upon by appellant, shows that reversal was required in that case due to surprise to the defense, not the procedure allowing late amendment. In this case, the Amended Bill of Particulars added as an aggravating circumstance that the crimes were committed to avoid arrest. Appellant was already aware of all of the evidence to be used by the State to prove it. After the Amended Bill was filed, defense counsel announced that he was ready. The defense was not surprised, and it so indicated. There was no error, and even if there had been, it was waived. See West v. State, 617 P.2d 1362 (Okl.Cr.1980).

XVII

In his next assignment of error, appellant contends that the judge should have instructed the jury that if it failed to arrive at a unanimous decision on the sentence, it would be discharged and a sentence of life would be imposed by the court. Two days after appellant filed his brief, Brogie v. State, 695 P.2d 538 (Okl.Cr.1985), was handed down by this Court. It addresses this issue squarely, and we find the assignment to be without merit.

XVIII

Appellant urges that reversible or modifiable error occurred when the prosecutor commented on the absense of mitigating evidence in the second stage of trial. No objection was raised, and therefore, the issue was not preserved for appeal. Crisp v. State, 667 P.2d 472 (Okl.Cr.1983). We also find that the remark did not amount to fundamental error. See Parks v. State, 651 P.2d 686 (Okl.Cr.1982). The distinction between the comment in this case and the one in Parks is only a matter of semantics, and we find this assignment to be without merit.

XIX

Appellant seeks reversal on the ground of ineffective assistance of counsel. Many of the arguments offered in support

of this assignment have already been discussed as independent bases for reversal and will not be readdressed in this context. Several other arguments concern counsel's failure to object to evidence, instructions, and conduct of the prosecutor. The remaining arguments may be classified as defense counsel's preparation for and presentation of the case at trial.

Before this Court can reverse on grounds of ineffective assistance of counsel, the appellant must show: 1) that counsel's performance was deficient; and, 2) that the deficiency prejudiced appellant's case. To demonstrate prejudice, appellant must show a reasonable probability that, but for counsel's deficient performance, the result would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We find counsel's performance adequate under the tests set forth in Strickland.

In some cases, counsel's failure to object may rise to the level of ineffective assistance of counsel, Aycon v. State, 702 P.2d 1057 (Okl.Cr.1985), but often such a failure will not be conclusive. See Roberts v. State, 568 P.2d 336 (Okl.Cr.1977). In this case, appellant claims that objections should have been raised concerning the introduction of other crimes evidence, the use of an aggravating circumstance filed just before trial, the incorporation of the State's first stage evidence in the second stage, the conduct of the prosecutor during closing arguments, and the instructions given by the trial court. We find that the other crimes evidence which consisted of a possible attempted kidnapping and an assault on a prison cellmate who gave testimony on behalf of the State was admissible to show common scheme and identity. As the evidence was properly admissible, we find that there was no deficiency in failing to raise an objection to it.

The statute concerning the use of aggravating circumstances, 21 O.S.1981, § 701.10, states that "[o]nly such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible." In Brewer v. State, 650 P.2d 54 (Okl.Cr.1982), this Court held that where the evidence in aggravation was timely made known and the defendant

was not surprised by it, the trial court properly allowed its use. In a subsequent appeal in that case, J. Brett clearly implied that the State is acting within the confines of 21 O.S.1981, § 701.10 so long as notice is given to the defendant prior to commencement of the trial.[1] In this case, there is no dispute as to whether notice of the aggravating circumstance was given prior to commencement of the trial. Therefore, it was properly admissible and counsel's failure to object did not demonstrate deficient performance.

Appellant does not refer to any first stage evidence to which defense counsel should have raised an objection. Even if we were to concede that failure to object is per se deficient performance, appellant has wholly failed to show how the deficiency prejudiced him. This showing is his affirmative obligation under Strickland, supra. Having failed to make any showing, the argument is without merit.

The prosecutor's conduct to which appellant claims an objection should have been raised involves a statement that appellant had presented no mitigating evidence at trial. We do not find the remark improper. In Parks v. State, 651 P.2d 686 (Okl.Cr.1982), cert. denied, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983), relied upon by appellant, the prosecutor's remark improperly weighed the aggravating circumstances against the mitigating circumstances, thus arguably invading the province of the jury. We noted that no objection had been raised and did not address the propriety of the remark except to say that it was not fundamentally prejudicial. In this case, the remark did not go to the weight of the circumstances and amounted to nothing more than fair comment on the evidence in light of the instructions given. Therefore, counsel's failure to object did not demonstrate deficient performance.

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[1] "But when a defendant pleads guilty or nolo contendere to First Degree Murder, there is no commencement of a trial to mark the deadline for notice by the State." Brewer v. State, 718 P.2d 354, 360 (Okl.Cr.1986). (Emphasis added.)

Appellant asserts that counsel's performance was deficient because he failed to record the hearing on his Application to Withdraw as Counsel. "Failure to have portions of a trial recorded may be a mistake, but it is not incompetence." Frederick v. State, 667 P.2d 988, 991 (Okl.Cr.1983). In this case, the unrecorded hearing was not even a part of the trial, and appellant fails to suggest how this mistake could have possibly resulted in prejudice to his case under Strickland.

Appellant urges that counsel did not present an adequate defense in either the first or second stage. He points out that nine State's witnesses were not cross-examined, and states that the cross-examination of the others was merely perfunctory. We note that the State called twenty-three witnesses to the stand. Those who were not cross-examined testified primarily about the discovery of evidence and its chain of custody, or were F.B.I. agents whose credibility before the jury and whose experience as State's witnesses was great. In cross-examining the other witnesses, counsel brought out that there was no real evidence of a struggle at the victim's home, that the eye witnesses' descriptions of appellant were inconsistent, that the tarp in which the victim's body was found might have come from anywhere, and that blood and hair found in appellant's station wagon may not have come from the victim. He did a thorough job of impeaching witnesses' testimony, argued for much of it to be stricken from the record, and prevented the admisssion into evidence of several photographs offered by the State. Appellant does not say what might have been accomplished by a more lengthy cross-examination. We cannot find counsel's performance deficient.

Appellant claims that counsel failed to use available evidence which was essential to the defense, relying on Smith v. State, 650 P.2d 904 (Okl.Cr.1982). We find the assertion wholly without merit. In Smith, the defendant pleaded insanity to a charge of first degree murder. Counsel failed to make inquiry of a psychiatrist concerning the defendant's sanity at the time of the conduct giving rise to the charges, even though that psychiatrist had rendered an opinion that the defendant was not

competent to stand trial, and even though the defendant had been under the psychiatrist's observation shortly after the deaths occurred. We held sua sponte that the defendant had received ineffective assistance of counsel, and remanded her case for a new trial.

In the present case, defense counsel had in his possession evidence which might have implicated the participation of others in the crime, but it would not have relieved appellant of criminal liability for his own participation in the crimes. Whether certain evidence should be used at trial is a matter of trial tactics, and generally will not be second guessed by this Court on appeal. Smith v. State, supra. Appellant "has not met his burden of showing that the decision reached would reasonably likely have been different absent the asserted errors." Anderson v. State, 719 P.2d 1282, 1284 (Okl.Cr.1986), citing Strickland, supra.

Appellant also claims that counsel admitted his client's guilt during first stage closing arguments.[2] We have held that conciliatory remarks of counsel may show ineffective assistance, Collis v. State, 685 P.2d 975 (Okl.Cr.1984), but we find nothing prejudicial in counsel's statement. Claiming that the appellant had not been involved at all would have completely destroyed counsel's credibility before the jury in light of overwhelming evidence of appellant's identity and testimony that appellant was apprehended with the ransom money after a chase by law enforecment officials. From the record, it appears that minimizing appellant's role was the only possible method of gaining an acquittal on either charge.

Appellant contends that trial counsel failed to inform himself that the crime of kidnapping is not a capital offense. We have dealt with the state of the law concerning kidnapping in assignment XI, and note that counsel's performance was not deficient for the reasons stated therein.

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[2] In closing argument, defense counsel stated, "There isn't any doubt that Jim Hale was involved in this. No doubt whatsoever. How much though? To what extent?"

Finally, appellant claims that counsel's performance was deficient in failing to present mitigating evidence and in admitting one of the aggravating circumstances in the second stage of trial. With regard to counsel's failure to call witnesses during the sentencing stage, we refer again to Smith v. State, 650 P.2d 904 (Okl.Cr.1982) wherein this Court held that after an attorney has determined what a witness' testimony will be, it is a question of trial tactics as to which, if any, witnesses will be used. Generally, this Court will not second guess the attorney's judgment, and specifically, we will not in this case.

The alleged concession of an aggravating circumstance was no concession at all. Counsel simply requested life imprisonment rather than death in case the jury did in fact find an aggravating circumstance. Stafford v. State, 669 P.2d 285 (Okl.Cr.1983), appears to be applicable to the present case:

> Although the argument may not have been the model closing argument, we cannot judge it by its lack of success . . . . It is to be remembered that trial counsel had the unenviable task of defending a man against whom the State had amassed a great deal of evidence.

Id. at 296.

Having reviewed and considered the record as a whole, we cannot find that appellant was denied his Sixth Amendment right to effective assistance of counsel.

XX

In his next assignment of error, appellant requests this Court to conduct a proportionality review and urges that his sentence of death is disproportionate to that of others who have committed similar offenses. We note that the proportionality review previously required by our death penalty statutes is no longer required, and no longer made. 21 O.S.1986 Supp., § 701.13; Foster v. State, 714 P.2d 1031 (Okl.Cr.1986), cert. denied, ___ U.S. ___, 107 S.Ct. 249. For the reasons discussed in our statutory review at proposition XXIII, however, we find the sentence of death appropriate under the facts of this case and the laws authorizing its imposition.

XXI

Appellant contends that this Court's application of the aggravating circumstance that a murder is "especially heinous, atrocious, or cruel," has been overbroad and unconstitutional. 21 O.S.1981, § 701.12. This is one of two aggravating circumstances found to be present by the jury in appellant's case. We recently addressed this exact issue in Stouffer v. State, 742 P.2d 562 (Okl.Cr.1987) (Opinion on Rehearing). We held that the application of this aggravating circumstance should be limited to those murders in which the death is preceded by torture or serious physical abuse.

Upon our review of the record below, the jury in Hale's case was properly instructed of this construction; they were instructed according to the uniform jury instructions (OUJI-Cr 436).

Moreover, the evidence sufficiently supports their finding. Perry received at least five gunshot wounds. The two to his head were fatal. He also was wounded in the abdomen, right leg and right arm. The wound to the abdomen perforated the small intestine four times and was also potentially fatal. At approximately 7:00 a.m. on the day of the first extortion calls, he was seen bent over holding his side and bleeding in a field and calling for help. This was near the home of Janet Miller McKenzie where appellant had stopped and asked to use a telephone. When appellant heard Perry, he returned to him and pulled him over the fence and into his vehicle. The testimony of Janet Miller McKenzie was corroborated by the finding of blood in the location where she saw the victim of a type consistent with Perry's blood.

This evidence is consistent with a finding that Perry suffered serious physical abuse prior to his death. He was conscious and suffering for a period of time before he died. Although the length of time which Perry suffered is not certain, the injuries were of a serious and painful nature.

XXII

Appellant's final challenge is to the constitutional sufficiency of our death penalty statutes. He contends that Oklahoma statutory scheme does not provide particularized guidance

to the jury in considering mitigating circumstances. We have addressed this issue in several cases and have maintained that our statutes adequately focus the jury's attention on particular mitigating factors. Liles v. State, 702 P.2d 1025 (Okl.Cr.1985), cert. denied, ___U.S.___, 106 S.Ct. 229 (1986); Brogie v. State, 695 P.2d 538 (Okl.Cr.1985). We are unpersuaded by appellant's arguments that this position is incorrect. Appellant's jury was given instructions previously approved concerning consideration of aggravating and mitigating factors and were acceptable.

XXIII

Pursuant to 21 O.S.Supp.1986, § 701.13(c), we have reviewed the record and verdicts herein and have determined that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We also find that the evidence supports the jury's finding of the two aggravating circumstances:

> 1) The murder was especially heinous, atrocious, or cruel; and,
>
> 2) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

In support of the latter finding, we note that there was evidence that the victim and his family knew or were familiar with appellant.

Finding no error warranting reversal or modification, judgments and sentences are AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY, OKLAHOMA
THE HONORABLE GARY R. BROWN, DISTRICT JUDGE

ALVIE JAMES HALE, JR., appellant, was convicted in the District Court of Pottawatomie County, Case No. CRF-83-348, of Murder in the First Degree and Kidnapping for Extortion. He received the death penalty and life imprisonment, respectively. Judgments and sentences are AFFIRMED.

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OKLAHOMA CITY, OKLAHOMA
Attorneys for Appellee

OPINION BY: BUSSEY, J.
BRETT, P.J., CONCURS
PARKS, J., DISSENTS

PARKS, Judge, Dissenting:

I respectfully disagree with the majority's treatment of the appellant's first assignment of error, concerning the trial court's denial of his request for a change of venue. Appellant was tried and convicted of First Degree Murder and Kidnapping for Extortion and sentenced respectively to death and life imprisonment, in connection with the abduction of William Jeffry Perry, a Tecumseh bank official. Appellant's arrest, subsequent F.B.I. and police investigation, and court proceedings, garnered extensive press coverage in the Oklahoma County-Pottawatomie County area, in part because Perry was a member of a prominent banking family in Tecumseh.

The record reflects that a petition for a change of venue was filed on February 22, 1984, and met the requirements of 22 O.S. 1981, § 561. The original record contains a petition and two affidavits, and a third affidavit was presented at the hearing on the petition. Neither the prosecutor at trial, nor the Attorney General on appeal, claim that the procedural requirements of Section 561 were not fulfilled. At the hearing on February 24, 1984, two of the affiants were called to testify. Don Ferrell testified that he had been a resident of Shawnee, in Pottawatomie County for ten (10) years, and that "just about" everyone he knew felt appellant was guilty because "that many other people couldn't be wrong." Mr. Ferrell was related to, or an acquaintance of, the appellant. Appellant's uncle, Clarence Hale, testified many persons had told him they believed his nephew was guilty. Defense counsel submitted twenty-six (26) newspaper articles concerning the case, which were taken from the "Daily Oklahoman" in Oklahoma City, and the "News-Star" in Shawnee. The State offered no counter-affidavits or testimony. The trial judge took the petition under advisement until after voir dire, at which time it was overruled. Testimony of those veniremen actually selected to

serve on the jury revealed that all twelve had knowledge about the case, six had formed an opinion regarding appellant's guilt, two either personally knew the appellant or a member of his family, and three either knew the victim or his family.

Appellant's claim rests upon the Due Process Clause of the Fourteenth Amendment which requires, as a standard of fairness, that an accused have "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). This requirement of indifference does not mandate that jurors "be totally ignorant of the facts and issues involved." Murphy v. Florida, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). However, "the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" Id. Moreover, in reviewing a due process claim of this nature, appellate courts "must make their own evaluations of the circumstances and not defer unduly to the discretion of the trial judge." Scott v. State, 448 P.2d 272, 275 (Okla. Crim. App. 1968).

An appellant may demonstrate a due process violation under one of two standards: First, prejudice is presumed if the facts reveal "the influence of the news media, either in the community at large or the courtroom itself, pervaded the proceedings" and that the "trial atmosphere [was]...utterly corrupted by press coverage." Murphy v. Florida, supra, at 798-99, 95 S.Ct. at 2035. The key to this standard appears to be the "solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of the mob." Id. at 799, 95 S.Ct. at 2036. Second, if the circumstances are not so egregious to raise this presumption, the so-called "totality of circumstances" will be examined by the reviewing court to discern whether the trial was "fundamentally fair." Id. at

799, 95 S.Ct. at 2036. Appellate review of the circumstances surrounding the trial should focus on the voir dire statements of the individual jurors actually selected to serve, voir dire statistics, and the community atmosphere as reflected in the news media. Id. at 800-08, 95 S.Ct. at 2036-38. Accord Walker v. State, 723 P.2d 273, 278 (Okla. Crim. App. 1986).

Appellant does not argue, and I do not find, that the proceedings were entirely devoid of the solemnity and sobriety to which a defendant is entitled under the first test of Murphy, supra. Therefore, I cannot "presume" that appellant was deprived of due process, as was found in the egregious media coverage situations which developed in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). However, from my reading of the record, the appellant has sufficiently demonstrated a reasonable possibility of existing prejudice to establish that he was deprived of "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). The State claims that "[p]ersons with preconceived opinions for or against the defendant, or who had any question as to their ability to be impartial, were excused." Brief of Appellee, at 16. Unfortunately, the record does not support the State's interpretation of the facts.

The voir dire testimony in this case reveals that each of the jurors eventually seated had knowledge of the case, either through news accounts or conversations with other community members. One of the jurors, a hairstylist, testified she overheard a conversation in her shop in which a State's witness discussed the case. A second juror was a photojournalist with the Shawnee "News-Star" and had, by his own admission, "assisted in news coverage of the case." In Scott v. State, 448 P.2d 272 (Okla. Crim. App. 1968), this Court reversed a manslaughter conviction, based partly on the trial court's

failure to grant a change of venue. Judge Brett, writing for the Court, noted:

> The record reflects that all members of the jury had read something about the case in the newspaper. Admittedly, each stated his opinion was not fixed, and that he could reach a decision based on the evidence. But where a reasonable possibility of prejudice is shown to exist, concerning wide-spread pre-trial publicity, and its possible effect on the jury panel is shown to exist, then discretion seems to dictate a change of venue.

Id. at 274.

Aside from mere knowledge, two of the jurors in this case were acquainted with the appellant or his family, and three knew either the victim or his relatives. One juror commented that he had played golf with the appellant; however, he also knew "all of the Perrys" and "did a significant amount of business with them. Another juror, the photojournalist, knew several of the police officers and the District Attorney. Although not actually seated on the jury, one potential juror had dated the victim, and another testified to his "great sympathy" for the Perrys, with whom he was acquainted. Our statement in Scott, that "[i]n this case personalities were of such nature which, coupled with possible preconceived opinions imposed by the press, prejudice could have been easily caused against this defendant", Id., seems applicable here.

Of greatest concern in my review of the voir dire testimony is that six of the twelve jurors admitted holding pre-trial opinions regarding the issue of appellant's guilt. Admittedly, as in Scott, supra, most with an opinion stated that it could be set aside and would not affect their deliberations; yet, one of these jurors candidly stated that he "didn't know" if he could decide the case impartially, since he had "heard so much about the case...." (Tr. I, at 45-47) Another juror testified that she had an opinion about the guilt or innocence of the defendant from news media reports, but "[n]ot one that couldn't be swayed." (Tr. I, at 131) The situation herein is not entirely unlike that in Irvin v. Dowd, supra, in which the United States Supreme Court reversed a

conviction due to possible juror prejudice engendered by pre-trial publicity. In Irvin, eight of the twelve jurors had formed an opinion regarding the defendant's guilt prior to trial, and some went "so far as to say that it would take evidence to overcome their belief." Id. at 728, 81 S.Ct. at 1645.

The newspaper articles submitted to the trial court also reveal extensive pre-trial publicity in the Pottawatomie County area. The community atmosphere is reflected in the following statements taken from newspaper clippings: "Disbelief hung over [the] town Thursday as news spread about Perry's abduction and shooting death." "Merchants up and down Tecumseh's main street shook their heads and grieved for the loss." "Perry's family is well known throughout the town. His father, William A. Perry, is president and board chairman of Farmers and Merchants Bank. Joan Perry, his mother, is the bank's vice-president." "News of the death of Jeff Perry spread from friend to friend. All the residents could do was pray, stay indoors and trade childhood stories [about Jeff]."

The articles also revealed details of the appellant's background, including a reference to his three prior felony convictions, and twelve lawsuits which had been filed against him over the past twelve years. The articles noted that appellant did not testify on his own behalf in federal court where he was charged with extortion stemming from the incident. The articles further publicized the testimony of his cellmate, and revealed that appellant's trial counsel attempted to withdraw from the State court case. Apparently, several of the stories were featured prominently on the front page of the Shawnee "News-Star," the Pottawatomie County community newspaper. When the appellant was convicted in federal court, a large, full-page width headline proclaimed, "Hale found guilty of extortion." The article also reported that Federal District Judge Lee West commented following the non-jury trial that it was with "little or no difficulty that this court finds the defendant guilty."

Finally, the record reflects that thirty-seven potential jurors were examined in voir dire proceedings. Thirty-four admitted knowledge about the case, twelve stated they had formed an opinion about the appellant's guilt, four knew either the appellant or his family, and eight were acquainted with Mr. Perry or his family. Three potential jurors were removed for cause by the trial court for bias.

Our system of justice rests firmly upon the maxim that an accused is presumed innocent until proven guilty. Justice Frankfurter summed it up best in his concurring opinion in Irvin v. Dowd, 366 U.S. 717, 728, 81 S.Ct. 1639, 1646 (1961):

> [N]ot the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated with press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.

Therefore, an "impartial jury" is one that can be reasonably expected to abide by the presumption of innocence and to base a verdict on the evidence presented in court, and not on private speculation or media coverage. For the foregoing reasons, under the circumstances surrounding this case, I find that appellant was deprived of his fundamental right to be tried by an "impartial jury" as mandated by the Due Process Clause of the Fourteenth Amendment and Article II, § 20 of the Oklahoma Constitution. I would reverse and remand this case for a new trial. Accordingly, I dissent.

APPENDIX B

PETITION FOR REHEARING

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 18 1983
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALVIE JAMES HALE, Petitioner,	)	
vs.	)	Case No. F-84-208
THE STATE OF OKLAHOMA, Respondent.	)	

PETITION FOR REHEARING

The Petitioner, Alvie James Hale, appears by his attorney and requests that this Court grant rehearing and reverse Mr. Hale's conviction on the basis of the material submitted below and based on the material submitted in the accompanying "Supplement to Petition for Rehearing." In the alternative, Petitioner requests that this Court order that an evidentiary hearing be conducted in connection with the information contained in the Supplement to Petition for Rehearing. As indicated in those supplemental materials, the new evidence is particularly compelling considering the fact that Nicki Johnson's description contains similarities to the original description provided by State's witness Janet Miller and considering the fact that the new material appears to constitute the first concrete independent evidence to support the defense theory that someone other than Alvie Hale killed Jeff Perry.

Petitioner also states that there are previously presented issues that this Court should reconsider for reasons set forth below, that there are additional issues not presented in previous briefing that merit this Court's attention, that there exists the possibility that this Court has misunderstood some material facts that could effect the outcome of the appeal, and that there are other substantial reasons for having a rehearing of this appeal.

The bases for rehearing:

I

THERE SHOULD BE A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE OR AN EVIDENTIARY HEARING ORDERED TO DETERMINE ALL THE FACTS CONCERNING THE NEW LINE OF INFORMATION.

For reasons stated in the accompanying Supplement to Petition for Rehearing and its attached Exhibits A-F, this Court should order a new trial or an evidentiary hearing. See Smith v. State, 590 P.2d 687 (Okl.Cr. 1979).

II

THERE SHOULD BE AN EVIDENTIARY HEARING TO DETERMINE WHETHER SUPPRESSED EXCULPATORY EVIDENCE EXISTS.

Because of a number of unanswered questions raised by the Supplement to Petition for Rehearing and its accompanying exhibits, there should be an evidentiary hearing to determine whether there is suppressed exculpatory evidence. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). For example, there is the unanswered question of why the prosecution considered Nicki Johnson to be a suspect even before the interview with Bernie Bryant occurred.

III

THERE SHOULD BE AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL.

If the failure of the Bernie Bryant material and related material to presented resulted from the ineffective assistance of counsel, there should be a new trial on that basis because the new material is of great relevance to punishment and possibly also to which offenses, if any, Mr. Hale committed aside from the extortion which is a separate federal case. Exhibit B to the Supplement to Petition for Rehearing calls this matter further into question because it shows there was some evidence given to defense counsel which would tend to be exculpatory which trial counsel failed to present. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

IV

THERE ARE EIGHTH AND FOURTEENTH AMENDMENT INTERESTS IN THE ACCURACY OF FACT FINDING IN DEATH PENALTY CASES AND A NEW TRIAL, OR AT LEAST AN EVIDENTIARY HEARING SHOULD BE ORDERED IN SUPPORT OF THOSE INTERESTS.

The material contained in the Supplement to Petition for Rehearing and its exhibits calls into question the accuracy of the fact finding in a case where Petitioner is under a sentence of death. Because of Eighth and Fourteenth Amendment interests in assuring that both guilt and punishment have been fairly and accurately determined in such cases, either a new trial or an evidentiary hearing should be afforded. Such important decisions should be based on the jury having access to full information, not just selected information possibly favorable to the accused. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982). The sentencing body -- judge or jury -- should have full information relating to punishment, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197 (1977), and there should be assurance that fact finding is not only accurate, but made on an appropriate basis. See Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982).

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THIS COURT SHOULD RE-EVALUATE THE CHANGE OF VENUE ISSUE IN THIS CASE BECAUSE ONE OF THE JURORS WITH A PRE-FORMED OPINION ABOUT THE CASE FAILED TO INDICATE HE COULD DISREGARD THAT OPINION AND OTHERS WERE EQUIVOCAL ABOUT WHETHER THEY COULD SET OPINIONS ASIDE.

In this Court's opinion this Court states in the third paragraph on page three: "Each of the jurors finally seated stated that he or she could set aside any opinion held and impartially judge the case on the evidence presented at trial." Petitioner's attorney first urges the adoption of the position of the dissent that having six of the twelve final jurors with pre-formed opinions is inexcusable even if all six had said they could set their opinions aside. However, Petitioner's attorney has been unable to determine where juror Huddleston said he could set his opinion aside. Instead Huddleston only said that the opinion was a mild one which could be swayed by evidence. (Tr. 131) This statement by Huddleston indicates that instead of Mr. Hale starting with the strong presumption of innocence to which he was entitled, Mr. Hale started with a mild presumption of guilt. Having a defendant start off with such a bias against him is contrary to the dictates of the Eighth and Fourteenth Amendments to the federal constitution. Cf. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

Additionally, although juror McLaughlin said he could set his opinion aside at one point, there is substantial reason from the series of questions and answers to doubt the firmness of that belief. The following occurred:

> THE COURT: So you are telling me that although you now have an opinion, that you can lay it aside and start fresh and presume the Defendant innocent?
> MR. McLAUGHLIN: Yes.
> THE COURT: Would what you have heard influence your ability to decide the case impartially?
> MR. McLAUGHLIN: I don't know.
> THE COURT: Have you expresse an opinion before today?
> MR. McLAUGHLIN: I have expressed my opinion before today, even --
> THE COURT: Outside the court?
> MR. McLOUGHLIN: Where I worked. Outside of here, yes, sir.
> THE COURT: You are telling me that you don't know if you can decide the case impartially, is that what you are telling me?
> MR. McLAUGHLIN: That's right.
> THE COURT: That you just really don't know.
> MR. McLAUGHLIN: I really don't know.

(Tr. 46-47)

The bottom line for juror McBee appeared to be that he thought he could set his bias aside or would at least "attempt to." (Tr. 54) These responses, in a case where there were so many other circumstantial indicia of bias, fail to provide any assurance that Mr. Hale had a fair and impartial jury. Even one sitting biased juror is enough to merit reversal. Here one said he was leaning toward the prosecution and failed to show that he would set that bias aside

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and half the jury had formed an opinion about the case prior to coming to court. Under those circumstances, the Court should re-examine both the facts of this case and the law and reverse Mr. Hale's convictions and sentences on rehearing.

VI

THIS COURT SHOULD RE-EXAMINE THE EFFECTIVE ASSISTANCE OF COUNSEL ISSUE IN LIGHT OF DOUBTS ABOUT TRIAL COUNSEL'S DILIGENCE AND DOUBTS ABOUT HIS STRATEGY.

On page 17 of the Court's opinion this Court indicated it considered an apparent concession of guilt by trial counsel to be effective strategy. Such may be the case in some instances where trial counsel decides to go all out in the second stage and present substantial and persuasive mitigating evidence to attempt to avoid the death penalty. But where, as here, trial counsel failed to present any significant mitigation evidence to the jury, such could not have been trial counsel's strategy. Petitioner urges this Court to re-examine the first-stage concession issue in light of what happened in the second stage.

Additionally, on page 18 , this Court ascribed the failure to present mitigating evidence to trial strategy. However, if the defense attorney failed to investigate the mitigating evidence to any meaningful degree, he could not have been in a position to make an intelligent decision. The supplemental material submitted by Petitioner in connection with the brief in chief indicates a failure of investigation. A strategic decision cannot be made on the basis of failure to investigate. There is at least sufficient question about strategy to merit having the evidentiary hearing which Petitioner has requested.

VII

REVIEW BY THIS COURT HAS BEEN INADEQUATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION CONSIDERING BOTH THE FACTS OF THIS CASE AND THIS COURT'S REVIEW OF DEATH PENALTY CASES IN GENERAL.

Reasoning and analysis of this Court have been called into question in this case, see Parts V and VI of this opinion for example, and in other death penalty cases. See Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) cert. granted ___U.S. ___, 108 S.Ct. ___ (1988). Petitioner had a constitutional right to meaningful and accurate review both as to the particular case and as to the relationship with review of death penalty cases in general. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980).

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VIII

THE AGGRAVATING CIRCUMSTANCE INVOLVING PURPOSE OF AVOIDING LAWFUL ARREST OR PROSECUTION WAS NOT SUPPORTED BY THE EVIDENCE.

For some time this Court appeared to be limiting the aggravating circumstance of avoiding lawful arrest or prosecution to circumstances where there was something specific to show that purpose in fact existed. E.g., Banks v. State, 701 P.2d 418, 426 (Okl.Cr. 1985)(defendant told his girlfriend he killed so he would not be identified); Parks v. State, 651 P.2d 686, 695 (Okl.Cr. 1982) (defendant told informant he killed so gas station attendant would not identify him). Because such circumstances did not exist in the case at bar and because a broad definition of this aggravating circumstance or speculation regarding this aggravating circumstance would be inappropriate, Mr. Hale's death sentence should be vacated under Eighth and Fourteenth Amendments. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759.

IX

IF THE PURPOSE OF AVOIDING LAWFUL ARREST OR PROSECUTION CIRCUMSTANCE IS EXPANDED TO INCLUDE THE FACTS PRESENTED HERE IT IS AN UNCONSTITUTIONAL AGGRAVATING CIRCUMSTANCE.

If the avoiding lawful arrest or prosecution circumstance is applied to circumstances such as those in Mr. Hale's case, where the purpose of the homicide is speculation and where Mr. Hale's purpose is speculation, then the aggravating circumstance is contrary to the Eighth and Fourteenth Amendments to the federal constitution. Id. ; Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) cert. granted ___U.S. __, 108 S.Ct. ___ (1988).

X

THE ADMISSION OF IMPROPER PHOTOGRAPHS WAS ERROR UNDER THE FEDERAL CONSTITUTION.

The admission of improper photographs, argued in Proposition VIII of the Brief of Appellant, was error under federal constitutional law in addition to being error under Oklahoma law. There was no assurance of reliable death penalty fact finding as required by the Eighth and Fourteenth Amendments when the prejudicial photographs interfered with important decisions. Cf. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). See Thompson v. Oklahoma, 107 S.Ct. 2184-85 (1987)(cert. granted on this issue).

APPENDIX NO. B-5

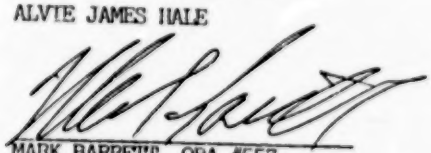
ALL ERRORS ASSERTED ON APPEAL WERE RAISED IN THE ORIGINAL OR AMENDED PETITION IN ERROR AND SUCH THUS IS NOT A BASIS FOR FINDING THEM WAIVED.

This Court in its opinion found certain issues to have been waived by not being included in the petition in error. Those issues were included in an amended petition in error which was filed on December 31, 1984 -- the same date as the filing of the Brief of Appellant. This Court should thus reconsider its determination that those issues were waived.

CONCLUSION

Considering the above and the accompanying supplement to the petition for rehearing , Petitioner requests that the judgments and sentences be reversed. In the alternative he requests that an evidentiary hearing be ordered.

Respectfully submitted,
ALVIE JAMES HALE

By: 

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APPENDIX NO. B-6

APPENDIX C

SUPPLEMENT TO PETITION FOR REHEARING

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 16 1983
JAMES W. PATTERSON
CLERK

ALVIE JAMES HALE,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

Case No. F-84-208

SUPPLEMENT TO PETITION
FOR REHEARING:

MOTION TO HOLD MANDATE IN ABEYANCE PENDING EVIDENTIARY HEARING AND FURTHER INVESTIGATION CONCERNING NEW EVIDENCE

AND

MOTION TO HOLD MANDATE IN ABEYANCE PENDING EVIDENTIARY HEARING ON ISSUE OF EFFECTIVE ASSISTANCE OF COUNSEL

The Petitioner presents the following facts and authority as reasons for granting a rehearing, ordering an evidentiary hearing, and reversing.

As noted in this Court's opinion, the defense theory at trial was that someone other than Mr. Hale must have killed Jeff Perry, even though there was strong evidence that Mr. Hale was the person who picked up the money extorted from Perry's family. As shown by the transcript of the trial and as stated by Mr. Hale's attorney in the attached Exhibit A there was not at the time of trial sufficient concrete independent evidence to convince the Jury that some other person may have had a more major role than Mr. Hale in the case and that someone else did the actual killing. Since Exhibit D, without question, casts an entirely new light on the case -- it even indicates that the homicide victim himself was part of the original extortion plot and apparently tried to back out. As stated in Exhibit C, the Appellate Public Defender's Office has yet to undertake significant investigation of this new evidence. An evidentiary hearing should be granted to explore this matter further.

This new evidence is persuasive particularly because because prosecution witness Janet Miller's original description of the man she saw in a station wagon while another man nearby was asking for help was an Indian man with a description similar to that of Nicki Johnson. Compare (Tr. 307, 310-11) with Exhibit F attached to this Supplement to Petition for Rehearing.

The information contained in the Bryant interview becomes even more persuasive when considering Exhibit B to this supplement. Exhibit B is an

affidavit of John Woods, an Oklahoma Baptist University mathematics professor who has been a neighbor of Alvie Hale, Sr. Woods's affidavit states that on the day prior to murder of Jeff Perry he also saw a person who was neither Alvie Hale Sr. nor Alvie Hale Jr. driving the Hale station wagon.

The Woods information, as indicated in the affidavit, was known to both law enforcement and to the defense attorney prior to trial and is a reason that evidentiary hearing should be granted not only as to the newly discovered evidence per se but as to whether Mr. Hale was deprived of effective assistance of counsel by his counsel not pursuing this matter more thoroughly previously.

Although an FBI report that Johnson had provided an alibi appears in the materials which were provided to defense counsel prior to trial, there is no explanation of why Johnson was considered a suspect and appellate counsel's conversation with trial counsel indicates that trial counsel had no information concerning why Johnson might be considered a suspect. An evidentiary hearing is necessary to explore that further unresolved question. Although counsel is not alleging that he has information that evidence has been suppressed by any arm of the prosecution, the circumstances merit exploring the matter further to determine if the defense has received all material to which it is entitled.

As stated in the seminal exculpatory evidence case of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), the fact that the new evidence might not totally clear the defendant does not preclude the evidence from being favorable to the accused. As Brady indicates, if the evidence could possibly change the defendant's punishment -- and evidence that defendant was not the triggerman could change the punishment -- the evidence is materially exculpatory. The facts of this case are similar in many respects to those set forth in Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984).

A new trial, or at least an evidentiary hearing to explore the matter further, should be granted under Oklahoma law, as well as under federal constitutional law. See, e.g., Smith v. State, 590 P.2d 687 (Okl.Cr. 1979).

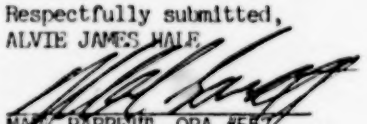
This information establishes at least a question as to whether the requirements of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) have been met, especially considering all the material already in the record questioning both whether trial counsel's performance was adequate and whether he should have been permitted to withdraw from the case. See Propositions III and IV of the Brief of Appellant in this case.

APPENDIX NO. C-8

For the reasons and upon the authorities stated above -- and considering the materials attached as Exhibits A-F and considering the transcripts, records, briefs, and evidence previously submitted to this Court -- this Court, on the basis of new information regarding other persons implicated in the Jeff Ferry homicide should grant Mr. Hale a new trial or order an evidentiary hearing to determine if the new material warrants there being a new trial.

Corroboration to the Bernie Bryant report exists, including the corroboration mentioned above and other corroboration already in the record. An evidentiary hearing is needed to determine the extent of further corroboration, both in Mr. Hale's interest to determine if he was appropriately convicted and punished and in the interest of determining if there are additional or different individuals who should be brought to justice.

Respectfully submitted,
ALVIE JAMES HALE

By: 

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APPENDIX NO. C-3

AFFIDAVIT OF GEORGE VAN WAGNER

STATE OF OKLAHOMA)
) ss:
COUNTY OF POTTAWATOMIE)

I, George Van Wagner, of lawful age and being first duly sworn upon oath, do swear and state that the matters set forth below are true and correct.

I was attorney of record for Alvie James Hale, Jr. in Pottawatomie Case No. CRF-83-348, State of Oklahoma v. Alvie James Hale, Jr.

I was unaware prior to trial of any concrete independent evidence that would show that some person or persons additional to Mr. Hale were involved in the kidnapping and extortion plot involving Jeff Perry. I have this date been made aware of an F.B.I. report dated October 6, 1986 which involves a statement of Bernie Ray Bryant. The statement which was made known to me today appears to involve Bryant's implicating a Mayo Bates and a Nicki Johnson in the Perry kidnapping, extortion and homicide. I was not aware until today of the information contained in this report.

The information contained in this F.B.I. report is the type of information I would have wanted to use at trial and the type of information I would have considered valuable to have presented at trial.

Further affiant saveth not.

G Van Wagner
GEORGE VAN WAGNER

Subscribed and sworn to before me this 17th day of February, 1988.

Stacey Wyatt
NOTARY PUBLIC

My Commission Expires:
2-13-90

APPENDIX NO. C-4

AFFIDAVIT OF JOHN WOODS

STATE OF OKLAHOMA)
) ss:
COUNTY OF POTTAWATOMIE)

I, JOHN WOODS, of lawful age and being first duly sworn upon oath, do swear and state that the matters set forth below are true and correct to the best of my knowledge and belief.

I live in Pottawatomie County and am the next door neighbor of the Alvie James Hale, Sr. family. On October 10, 1983, the day before the murder of Jeff Perry, sometime in the afternoon, I saw a man drive by my house in what I believed to the the Hales' station wagon. This man looked unkempt with long hair and a beard. It was not Alvie James Hale, Jr. or Alvie James Hale, Sr. He drove slowly past my house and up the hill toward the Hale residence.

I made this information known to Alvie J. Hale, Sr., the Oklahoma State Bureau of Investigation and to Mr. Hale, Jr.'s attorney, Mr. Van Wagner. I would have been willing to testify at Jim Hales' trial to this information, but was not called to testify.

Further, affiant sayeth not.

John Woods
JOHN WOODS

Subscribed and sworn to before me this 11th day of February, 1988.

[signature]
NOTARY PUBLIC

My Commission Expires:
[handwritten date]

AFFIDAVIT OF MARK BARRETT

I, Mark Barrett, being of legal age and having been duly sworn, upon oath state:

1. The attached Exhibit D, a 1986 Federal Bureau of Investigation interview of Bernie Ray Bryant, is a document which the Appellate Public Defender's Office received from District Attorney Bill Roberson in 1987. A copy of the accompanying letter from Roberson is attached as Exhibit E; a copy of the additional FBI report which Mr. Roberson sent is attached as Exhibit F. Although I was not assigned to the Hale case at the time, I subsequently talked to Mr. Roberson on the telephone and he confirmed having sent the material to this office.

2. I discussed the matter with various employees of the Appellate Public Defender's Office and with Elaine Meek, who was no longer employed by this office but who had done the briefing in the case, and the FBI report appeared to provide the first indication to this office of concrete independent evidence that some person other than Mr. Hale was involved in killing Jeff Perry.

3. Since having been assigned to Mr. Hale's case I have not been sufficiently freed from other ordinary duties to do any significant investigating of this new information myself. Only within the last few days have I been authorized for any investigating help on this matter and that help has been extremely limited. I have been assured, however, that if this Court were to order an evidentiary hearing, that I could receive additional investigating help. So far, this office has not even interviewed Mr. Bryant, who Mr. Roberson told me is incarcerated.

Further affiant saith not.

MARK BARRETT

Subscribed and sworn to before me on this 18th day of February, 1988.

Karen Balling
NOTARY PUBLIC

My commission expires:
3/22/87

APPENDIX NO. E-6

FEDERAL BUREAU OF INVESTIGATION

1

Date of transcription 10/6/86

BERNIE RAY BRYANT, nickname BUTCH, was interviewed at the FBI office where he come regarding other matters. During this time BRYANT furnished the following information with regard to information which he had been told sometime in the past by one MAYO BATES:

BATES once told BRYANT that he (BATES) had been present when an individual named NICKI JOHNSON shot an individual in the Shawnee, Oklahoma area. BATES had explained that the individual who was shot was the son of an individual who is the president of a bank in Tecumseh, Oklahoma.

The banker's son, BATES, and JOHNSON, had apparently formulated a scheme whereby they would claim that the banker's son had been kidnapped and thereafter demand a large sum of money from the banker.

BATES stated that the banker had gone with JOHNSON and BATES to a remote area of Pottawatomie County, Oklahoma where they were hiding out while this scheme was being carried out.

Apparently the banker's son decided he no longer wanted any part of this scheme and tried to leave. BATES and JOHNSON tried to talk him out of it and apparently as he left, JOHNSON fired a shot in an attempt to scare him but actually struck the banker.

BATES seemed to indicate that the banker's son subsequently died as a result of the shooting and other wounds inflicted upon him by apparently JOHNSON.

BATES and JOHNSON thereafter allegedly rolled the body into some sort of a tarpaulin or rug and hid it in some sort of an abandoned oil tank.

BATES also indicated that another individual had been in on the scheme. This individual had been present apparently during the above described shooting etc. This individual was also to be used as the pick up man for the ransom money.

Investigation on 9/25/86 at Oklahoma City, Oklahoma File # Oklahoma City 26A-47832

by SA JOSEPH R. FITZPATRICK
SA THOMAS A. GRAY II:TAG:gw Date dictated 10/1/86

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

GPO : 1986 O - 499-243

APPENDIX NO. C-7

OFFICE OF THE DISTRICT ATTORNEY
TWENTY-THIRD JUDICIAL DISTRICT, SHAWNEE, OKLAHOMA 74801 (405) 275-6880

BILL ROBERSON
DISTRICT ATTORNEY

July 16, 1987

Appellant Public Defender's Office,
217 Civic Center Music Hall,
OKC, OK 73102

RE: ALVIE JAMES HALE, Case Number CRF-83-348/ Case F-84-208

Dear Sir:

Enclosed please find a copy of an F.B.I. interview with one bernie "Butch" Bryant, dated the 25th day of September, 1986. The existence of this document was not brought to my attention until a couple of days ago. I am also enclosing a copy of a statement by Nicki Johnson, taked in October of 1983, which was made available to counsel prior to trial. If you have any further questions, please feel free to call me.

Yours Truly,

Bill Roberson
BILL ROBERSON, District Attorney

BR:jrb

Enclosures: Two (2)

APPENDIX NO. C-8

EXHIBIT P

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/26/83

1*

Nickey Leo Johnson was contacted at Dee Briton Restaurant, Shawnee, Oklahoma, advised the identity of interviewing agent. Mr. Johnson stated he resides at 417 North Kimberley, Shawnee, Oklahoma, his date of birth is January 31, 1947, he was born at Shawnee, Oklahoma. He is described as a male Indian, 6'4", 240 pounds, black hair, blue eyes. Johnson stated that he is by trade a dry wall worker.

Mr. Johnson was asked if he knew Alvie James Hale, he stated that he had known him for a number of years, but he last saw him about the fourth or fifth of October, 1983 and that he had talked with him on that date. He stated that he did not see him on the 10th or 11th of October and that he has not seen him since that day. He understands that he had been arrested by the FBI on October 12, 1983.

Johnson was advised that someone who appeared similar to Johnson's description was seen on October 11, 1983, in a older model station wagon. Johnson stated he was not operating a station wagon on that day and that he was at a car sale, known as Oklahoma Auto Auction, with a Russell Bristow in Oklahoma City, from about 11:00 a.m. to 5:00 p.m. on October 11. Prior to that he had spent the night with a Debbie Ackerman who lives on 37th Street in Oklahoma City. He stated that Ackerman would vouch for his whereabouts.

Mr. Johnson was advised that a photograph of him to put in a show-up would eliminate the necessity for these interviews. Johnson declined to give any photograph although he was unable to give an explination as to why he did not want his picture taken. He just stated that he was camera shy and did not want his photograph taken. Even though this may necessitate the interview of his wife and his girlfriend concerning his whereabouts.

Investigation on 10/25/83 at Shawnee, Oklahoma File # Oklahoma City 192A-78

by SA Richard James Elroy/mdo Date dictated 10/25/83

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

192D-78-156

APPENDIX NO. C-9

APPENDIX D

ORDER DENYING PETITION FOR REHEARING

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 2 1988
JAMES W. PATTERSON
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ALVIE JAMES HALE,)
:)
Petitioner,)
:)
-vs-) No. F-84-208
:)
THE STATE OF OKLAHOMA,)
:)
Respondent.)

ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

NOW on this 2nd day of March, 1988, having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 2nd day of March, 1988.

TOM BRETT, PRESIDING JUDGE

HEW J. BUSSEY, JUDGE

ATTEST:

Clerk

APPENDIX NO. D-1

APPENDIX E

JUDGEMENT AND SENTENCE ON CONVICTION

IN THE DIS ICT COURT OF THE TWENTY-THIRD ICIAL DISTRICT
SITTING IN AD FOR POTTAWATOMIE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

vs.

No. CRF-83-348

ALVIE JAMES HALE, aka
ALVIE JAMES HALE, JR.,
aka JIM HALE,

Defendant.

FILED
IN DISTRICT COURT
MAR 22 1984
POTTAWATOMIE COUNTY, OKLA.
DEPUTY COURT Clerk
By Kelley Poe Dep.

JUDGMENT AND SENTENCE ON CONVICTION

Now on this 22nd day of March, 1984, the same being one of the regular judicial days of the District Court of Pottawatomie County, State of Oklahoma, this cause came on regularly for hearing on defendant's Motion for New Trial and for Judgment and Sentence, and the defendant, ALVIE JAMES HALE, aka ALVIE JAMES HALE, JR., aka JIM HALE, being present in person and by his counsel, George Van Wagner, in open Court, and the State of Oklahoma being represented by Bill Roberson, District Attorney of Pottawatomie County, State of Oklahoma, and the said defendant Alvie James Hale, aka Alvie James Hale, Jr., aka Jim Hale, having been duly presented and arraigned and having plead "Not Guilty" to Count 1, the offense of MURDER IN THE FIRST DEGREE, and Count 2, the offense of Kidnapping for Purposes of Extortion, as charged in the Information filed herein, and having been duly and regularly tried and convicted of said offenses in Pottawatomie County, State of Oklahoma, and said Motion for New Trial having been duly presented and argued, and the Court, after taking the same under consideration and being fully advised in the premises finds: That said Motion for New Trial should be overruled.

THEREFORE, it is the judgment of the Court that defendant's Motion for New Trial be and the same is hereby overruled, to which ruling of the Court defendant excepts and exception allowed.

THEREUPON, defendant having been asked by the Court whether he had any legal cause to show why judgment and sentence should not be pronounced against him, in conformity with the verdict of the Jury, and the defendant giving no good reason why said judgment and sentence should not be pronounced, and none appearing to the Court:

THE COURT does hereby adjudge and sentence the said defendant, ALVIE JAMES HALE, aka ALVIE JAMES HALE, JR. aka JIM HALE, for the offenses by him committed, in conformity with the verdict of the Jury.

IT IS THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the said defendant, ALVIE JAMES HALE, aka ALVIE JAMES HALE, JR. aka JIM HALE, on Count 1, Murder in the First Degree, be conveyed from the bar of this Court to the County Jail of Pottawatomie County, State of Oklahoma and within ten (10) days thereafter be by the Sheriff of Pottawatomie County, State of Oklahoma, transported to the State Penitentiary at McAlester, Oklahoma, where the warden of the said State Penitentiary at McAlester, Oklahoma, is hereby directed to confine the said ALVIE JAMES HALE, aka ALVIE JAMES HALE, JR. aka JIM HALE until June 20, 1984 and commanded on that day to put the said ALVIE JAMES HALE, aka ALVIE JAMES HALE, JR. aka JIM HALE to death by continuous intravenous administration of a lethal quantity of an ultra-short acting barbituate in combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice, or in any other manner required by law, within the walls of the State Penitentiary at McAlester, State of Oklahoma, in all respects as provided by law for such execution, and the Clerk of this Court is commanded to delivery to said Sheriff of Pottawatomie County, State of Oklahoma, a certified copy of this judgment and sentence, together with the death warrant, which will be sufficient warrant and authority to said Sheriff of Pottawatomie County, State of Oklahoma, and Warden of the State Penitentiary at McAlester, Oklahoma, for the execution of the judgment and sentence as herein provided; return of these proceedings hereunder to be endorsed thereon and filed as provided by law.

APPENDIX NO. E-1

IT IS THE FURTHER ORDER of the Court that the defendant on Count 2, Kidnapping for Purposes of Extortion be sentence to Life imprisonment, said term to be served only in the event the defendant's death penalty be modified to a term of years or to life imprisonment, in which case the punishment prescribed in Count 2 is directed to run consecutively to any term of years or life sentence which may later be imposed in Count 1, Murder in the First Degree.

THEREUPON, the defendant, ALVIE JAMES HALE, aka ALVIE JAMES HALE, JR., aka JIM HALE, by his counsel, in open court, gave notice of his intention to appeal from the judgment and sentence on both counts herein pronounced.

IT IS THEREFORE the judgment and order of the Court that the defendant, ALVIE JAMES HALE, aka ALVIE JAMES HALE, JR., aka JIM HALE be allowed and he is hereby granted the time allowed by law in which to make, prepare and serve the transcript herein, to all of which proceedings the defendant, ALVIE JAMES HALE, aka ALVIE JAMES HALE, JR. aka JIM HALE, excepted and exceptions duly allowed.

GARY BROWN
District Judge

ATTEST:

RUBY POE, Court Clerk
Pottawatomie County
State of Oklahoma

APPENDIX NO. E-2